insolvent is fraudulent when fair consideration has not been given in exchange.[30] Fair consideration is defined in accordance with the common-law conception of the term.[31] An enactment, therefore, of the proposed statute will leave unaffected the law of the various states particularly concerned with the transactions between husband and wife. The question, however, seems more closely allied to the law of persons than it does to the law of fraudulent conveyances.

PRESUMPTION OF LEGITIMACY OF A CHILD BORN IN WEDLOCK. — Familiar to all lawyers, and to most laymen, is the age-old presumption that a child born of a married woman is the child of her husband.[1] As it first appeared in the common law, it was conclusive and no evidence was admissible in rebuttal.[2] This was in accord with the strict notions of the common lawyers, and was probably based upon regard for property rights, a bastard being incapable of inheriting or of having any heirs except those of his own body.[3] But with the advance of civilization and the recognition of rights of personalty, the presumption was relaxed and could be rebutted by evidence that the husband was impotent or was beyond the four seas of England at the time of conception.[4] The further development of ideas of individualism brought about the evolution of the modern rule permitting the presumption to be rebutted by any evidence appropriate to the issue.[5] To such rule there exists only one exception, that neither the husband nor the wife may testify directly as to the question of access.[6]

But the law has not gone to the full extent of regarding the presumption as based merely on logical inference. Almost universally it requires of the rebutting evidence a strength or clearness greater in degree than

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[30] Section 4, *supra*.

[31] Section 3, *supra*.

[1] For historical discussions, see preface, LE MARCHANT, The Gardner Peerage Case (1825); NICOLAS, ADULTERINE BASTARDY (1836), containing all the known cases on adulterine bastardy up to that date; Jospeh Cullen Ayer, Jr., "Legitimacy and Marriage," 16 HARV. L. REV. 22–42. Mr. Ayer advances the view that in its origin the notion of legitimacy was based upon domestic religion, and rejects the traditional explanation that marriage was a convenient and certain evidential fact indicating the heir.

[2] Y. B. 32–33 EDW. I. 60 (1304); see THAYER, CASES, EVIDENCE, 2 ed., 45.

[3] See 1 BL. COMM. 458, 459; 2 TIFFANY, REAL PROPERTY, 990, 991.

[4] ROLLE'S ABR. 358, tit. Bastards, letter B (1668); Co. LITT. 244 a. The last case seems to be Regina *v.* Murray, 1 Salk. 122 (1704). The Canon law looked only at actual paternity. See NICOLAS, ADULTERINE BASTARDY, 2.

[5] St. Andrews *v.* McBrides, 1 Str. 51 (1717); Pendrell *v.* Pendrell, 2 Str. 925 (1733); Shelley *v.* ——, 13 Ves. 56, 58 (1806). "The physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be lawfully proved by means of such legal evidence as is strictly admissible in every other case in which it is necessary, by the law of England, that a physical fact be proved." Banbury Peerage Case, 1 Sim. & Stu. 153, 155 (1811). See also cases cited *infra*, notes 13–17 inclusive.

[6] This exception is "founded on justice, decency, and morality." Lord Mansfield in Goodright *v.* Moss, Cowp. 591, 594 (1777). See also Scanlon *v.* Walshe, 81 Md. 118, 31 Atl. 498 (1895); People *v.* Case, 171 Mich. 282, 137 N. W. 55 (1912). For a criticism of Lord Mansfield's view, see Legge *v.* Edmonds, 34 L. J. Ch. 125, 135 (1856). The exception is not made in cases of antenuptial conception. Poulette Peerage Case, [1903] A. C. 395. *Contra*, Gates *v.* Marcia, 20 N. M. 158, 148 Pac. 493 (1915).

that capable of rebutting the ordinary presumption of fact.[7] That the courts are correct in demanding such extra *quantum* of proof seems clear upon a consideration of the conflicting interests involved. It is undeniable that society as a whole benefits by the prevention of bastardy, which is an anomaly in a system of law based upon the family as a unit. Moreover, in some jurisdictions, bastards are a charge upon society,[8] and almost everywhere statutory proceedings are necessary to fasten upon the father the burden of support.[9] From the point of view of the child, bastardy involves not only a social stigma, but also a loss of legal rights. At common law, he was *filius nullius*, and was denied a name unless he acquired one by reputation; having no family recognized by the law, he was incapable of inheriting property.[10] And while his degraded position has been ameliorated by statute, such legislation, being in derogation of the common law, is strictly construed.[11] But, on the other hand, while protecting the interests of the child and of society, the law should not ignore those of the alleged father. To place upon him the burden of supporting and recognizing a child not his own would be harsh indeed. Requiring unusual clearness in the proof of illegitimacy effects a compromise which does substantial justice to all concerned.[12]

Unfortunately, however, the expressions used to designate the degree of proof necessary to rebut the presumption are at wide variance. Some courts require a showing of natural impossibility.[13] Others, more moderate, say that satisfactory evidence is enough.[14] The prevailing statement is that the evidence must be strong, distinct, satisfactory, and conclusive.[15] A few have adopted the usual standard of criminal law, that is to say, proof beyond a reasonable doubt,[16] while two have in-

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[7] See *infra*, notes 13–17 inclusive.

[8] See, for example, People *v.* Chamberlain, 106 N. Y. Supp. 149 (1907).

[9] At common law, neither the father nor the mother had the duty to support bastard children. See RODGERS, DOMESTIC RELATIONS, § 605. But see, as to the mother, Humphreys *v.* Polak, [1901] 2 K. B. 385, 389.

[10] See 1 BL. COMM. 458, 459.

[11] Sanford *v.* Marsh, 180 Mass. 210, 62 N. E. 268 (1902).

[12] For a discussion of the individual interests in domestic relations, see Roscoe Pound, "Individual Interests in the Domestic Relations," 14 MICH. L. REV. 177–196.

[13] King *v.* Luffe, 8 East, 193, 206 (1807); Patterson *v.* Gaines, 6 How. 550, 589 (1848); Adger *v.* Ackerman, 115 Fed. (C. C. A.) 124, 133 (1902); Bunel *v.* O'Day, 125 Fed. 303, 317 (1903).

[14] Banbury Peerage Case, *supra*, p. 155.

[15] Morris *v.* Davies, 3 C. & P. 215, 217 (1827); on appeal, 5 Cl. & F. 163, 265 (H. L. 1837); Hargrave *v.* Hargrave, 9 Beav. 552, 555 (1846); Bosville *v.* Att'y-Gen'l, 12 Prob. Div. 177, 183 (1887); Scanlon *v.* Walshe, *supra*; Bullock *v.* Knox, 96 Ala. 195, 198, 11 So. 339 (1892) (husband and wife white, the child black, and the court indicated that these facts, of themselves, would be enough to rebut the presumption); Bell *v.* Territory, 8 Okla. 75, 83, 56 Pac. 853, 855 (1899); Bethany Hospital Co. *v.* Hale, 64 Kan. 367, 371, 67 Pac. 848, 849 (1902); People *v.* Case, 171 Mich. 282, 284, 137 N. W. 55, 56 (1912); Jackson *v.* Thornton, 133 Tenn. 36, 39, 179 S. W. 384 (1915).

[16] Plowes *v.* Bossey, 31 L. J. Ch. (N. S.) 681, 682 (1862); Stegall *v.* Stegall, 2 Brock. 256, 22 Fed. Cas. 1226 (1825), per Marshall, C. J.; Phillips *v.* Allen, 2 Allen (Mass.), 453, 454 (1861); Timmann *v.* Timmann, 142 N. Y. Supp. 298, 299 (1913); State *v.* Shaw, 89 Vt. 121, 129, 94 Atl. 434, 437 (1915) (the charge to the jury was that the rebutting evidence must be "proof to your satisfaction." The court said this was the same as proof beyond a reasonable doubt. *Sed quaere?*).

dicated that a mere preponderance is enough.[17] In many cases any one of these expressions may suffice, but hard cases are likely to arise where the terminology, if adhered to, is of vital importance. The facts of a recent case in California, *In re McNamara's Estate*,[18] are pertinent in this connection. The child was born three hundred and four days after the wife separated from the husband and went to live with a former lover. This was a possible, but exceptional, period of gestation. If the evidence must be conclusive, or show natural impossibility, the presumption had not been overcome. Yet it was fairly clear that the husband was not the father. The court, faced with the necessity of a definite choice, decided that, as the proof was beyond a reasonable doubt, illegitimacy had been made out. It is believed that this test is the most desirable one, for it not only carries out the policy of the law, but also provides a standard with the use of which the courts are familiar. Its universal adoption would make for simplification and certainty in an important social matter.

A peculiarity in the operation of the presumption of legitimacy deserves notice. A leading authority on evidence, Professor J. B. Thayer, laid it down as an invariable rule that the burden of proof is fixed by the pleadings and never shifts during the trial, and that the only function of a presumption is to shift the burden of going forward.[19] But the law undoubtedly is that once the fact of birth in wedlock is shown, the presumption of legitimacy continues until overcome by evidence at least greater than a mere preponderance.[20] It would seem to follow that the presumption necessarily involves a shifting of the burden of proof. If this is true, Professor Thayer's proposition may be maintained only by concluding that the presumption of legitimacy is not a presumption at all, but a special rule going to the weight of proof required. It seems more desirable, however, to retain the universal nomenclature for this law respecting birth in wedlock and to recognize it as an exception — probably the only one — to Thayer's general proposition that a presumption shifts only the burden of going forward with evidence.

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[17] Wright *v.* Hicks, 12 Ga. 155, 160 (1854) (antenuptial conception, however); Godfrey *v.* Rowland, 16 Hawaii, 377, 386 (1905). In the Poulette Peerage Case, *supra*, Lord Halsbury said, "The question is to be treated as one of fact, and like every other question of fact, when you are answering a presumption, it may be answered by any evidence appropriate to the issue." It should be noted that the case was one of antenuptial conception, and the question decided was that the husband could testify as to non-access before marriage. Probably the relevancy of the evidence, rather than its weight, was in the mind of the Lord Chancellor. In this country, there is some indication that in cases of antenuptial conception less evidence will be required. Wilson *v.* Babb, 18 S. C. 59, 70 (1882); Wright *v.* Hicks, *supra*. But see Wallace *v.* Wallace, 137 Iowa, 37, 44, 114 N. W. 527, 530 (1908). For the peculiar Louisiana rule, see McNeeley *v.* McNeeley, 47 La. Ann. 1321, 17 So. 928 (1895).

[18] 183 Pac. 552. See RECENT CASES, page 315, *infra*. Melvin, J., dissenting, thought that natural impossibility had not been made out and therefore the presumption had not been overcome.

[19] See THAYER, PRELIM. TREAT. EVID. 383, 384. He criticised the use of the phrase *onus probandi* in the Banbury Peerage Case as erroneous. *Ibid.* 358.

[20] See *supra*, notes 13 to 17 incl.; THAYER, CASES, EVIDENCE, 2 ed., 46, note.